

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

**MARITIME COMMUNICATIONS/LAND
MOBILE, LLC**

Participant in Auction No. 61 and Licensee of Various
Authorizations in the Wireless Radio Services
Applicant for Modification of Various Authorizations
in the Wireless Radio Services;

Applicant with ENCANA OIL AND GAS (USA), INC.;
DUQUESNE LIGHT COMPANY; DCP
MIDSTREAM, LP; JACKSON COUNTY RURAL
MEMBERSHIP ELECTRIC COOPERATIVE; PUGET
SOUND ENERGY, INC.; ENBRIDGE ENERGY
COMPANY, INC.; INTERSTATE POWER AND
LIGHT COMPANY; WISCONSIN POWER AND
LIGHT COMPANY; DIXIE ELECTRIC
MEMBERSHIP CORPORATION, INC.; ATLAS
PIPELINE—MID CONTINENT, LLC; DENTON
COUNTY ELECTRIC COOPERATIVE, INC., DBA
COSERV ELECTRIC; AND SOUTHERN
CALIFORNIA REGIONAL RAIL AUTHORITY

For Commission Consent to the Assignment of Various
Authorizations in the Wireless Radio Services

To: The Honorable Richard L. Sippel
Chief Administrative Law Judge

EB Docket No. 11-71
File No. EB-09-IH-1751
FRN: 0013587779

Application File Nos.
0004030479, 0004144435,
0004193028, 0004193328,
0004354053, 0004309872,
0004310060, 0004314903,
0004315013, 0004430505,
0004417199, 0004419431,
0004422320, 0004422329,
0004507921, 0004153701,
0004526264, 0004636537,
and 0004604962

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Federal Communications Commission
Bureau / Office

**MARITIME'S STATUS REPORT ON DISCOVERY
AND RESPONSE TO THE ENFORCEMENT BUREAU'S
REQUEST FOR THE PRESIDING JUDGE'S INTERVENTION**

Maritime Communications/Land Mobile, LLC ("Maritime"), by its attorney and pursuant to the Presiding Judge's March 12, 2012, Order (FCC 12M-19), respectfully submits this status report and response to the Enforcement Bureau's March 20, 2012, *Status Report on Maritime's Discovery Deficiencies and Request for Presiding Judge's Intervention* ("EB Status Report").

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ORIGINAL

A. Introduction

1. When the *EB Status Report* is stripped of all the characterizations and gratuitous accusations, it presents only four alleged deficiencies in Maritime's discovery responses. These are set forth in the chart appended as Exhibit E to the *EB Status Report*, a copy of which is appended hereto for convenient reference. The Bureau there complains that Maritime's response to discovery requests "is still missing" the following:

- (a) Subsumed Licenses: Information regarding incumbent licenses subsumed within Maritime's geographic licenses. *EB Status Report*, Exhibit E at n.2.
- (b) Interrogatory No. 13: "Confirmation for each location of each of Maritime's site-based authorizations (1) whether it is currently operating (i.e., on-the-air, transmitting a signal) and (2) whether it has been in continuous operation (i.e., continuously on-the-air, transmitting a signal) since its construction." *EB Status Report*, Exhibit E (top row, last column of chart).
- (c) Interrogatory No. 14: "Confirmation of whether operations of the stations listed in Table 3 of the Errata have resumed since the date of their temporary suspension and the date(s) on which any such operations resumed." *EB Status Report*, Exhibit E (middle row, last column of chart).
- (d) Interrogatory No. 15: "Whether any station under any call sign is currently off the air, and, if so, for how long, and why." *EB Status Report*, Exhibit E (bottom row, last column of chart).

Maritime addresses each of these items below, demonstrating that the Bureau's objections are without merit.

B. Subsumed Incumbent Licenses

2. Maritime has made clear all along its position that issue (g) is moot as to several of the incumbent licenses because they are subsumed within (and therefore superseded by) Maritime's geographic licenses covering the same area and channel block, a matter explained more fully below. The Bureau accuses Maritime of having reneged on a statement by undersigned counsel that discovery would not be withheld on this basis, but Maritime has done no such thing. As to each of the incumbent licenses, including the subsumed licenses, Maritime

has responded to the discovery requests to the extent it has responsive information. Maritime has stated, to the extent known by it, the grant date, construction deadline, and construction completion date for these licenses. It has further stated that, to the best of its knowledge, each of these licenses was timely constructed by the initial deadline and was in operation from that time to at least January of 2006. Maritime has also stated that it is not currently providing AMTS services directly to end users via its incumbent facilities, although it has identified those incumbent licenses pursuant to which it has lease spectrum to third party operators. In response to inquiries regarding the current operational status of the subsumed incumbent licenses, Maritime forthrightly stated that it is not certain of their current status and has made no effort to verify their status. That may not be the response the Bureau was hoping for, but it is a sufficient response and, in the particular circumstances (see ¶ 8, below), it is a reasonable response.

3. AMTS geographic (auctioned) licenses are awarded on two “channels” (Blocks A and B) in each of ten regional market areas. A geographic licensee has use of an entire channel block throughout the entire geographic area for which it is licensed, subject to the requirement that pre-existing incumbent licensees be protected within their 38 dBμ contour areas. Should an incumbent license expire, cancel, or cease to exist for any reason, however, the protective restriction no longer applies. The geographic licensee is then free to operate throughout the entire geographic area, including the area within the 38 dBμ contour of the former incumbent station. The 38 dBμ contour of an incumbent or site-based licensee’s station may therefore be thought of as a kind of Swiss-cheese hole in the geographic licensee’s authorized service area. If the incumbent license terminates, the hole is filled in and the geographic licensee then enjoys an unencumbered service area. *See, generally, Amendment of the Commission’s Rules Concerning Maritime Communications*, PR Docket No. 92-257, *Second Memorandum Opinion and Order and Fifth Report and Order*, 17 FCC Rcd 6685, 6696-6702 (2002).

4. Maritime holds both incumbent (site-based) and geographic (auctioned) licenses. Several of Maritime's incumbent licenses are "subsumed" by a geographic license, *i.e.*, the incumbent station's 38 dBμ contour lies within the authorized service area and on the same frequency block as a Maritime geographic license. These "subsumed" incumbent licenses are the ones designated by a status code of "G" (for geographic) in Table 2 of Maritime's interrogatory responses. As explained more fully below, designated issue (g) in this hearing is moot as to Maritime's subsumed incumbent licenses.

5. Issue (g) asks whether Maritime's incumbent licenses have automatically terminated by operation of law for failure to timely construct or permanent discontinuance. If it is ultimately determined that an incumbent license has terminated, then the area within the 38 dBμ contour for that license devolves back to the geographic licensee. In the case of the subsumed licenses, however, that geographic licensee is Maritime itself.

6. The primary question in this hearing is whether or not all of Maritime's licenses should be revoked on basic qualifications grounds. That matter will be resolved in one of two ways. Maritime's licenses will either be revoked or not. In the event Maritime were ultimately found unqualified, all of its licenses would be revoked, including the incumbent licenses. Alternatively, if Maritime's licenses are not revoked, either because it prevails on the merits or obtains Second Thursday relief, then the geographic licenses will remain in force, and the termination of any subsumed incumbent license would leave Maritime with exactly the same authority, because the area within the 38 dBμ contour would devolve to Maritime as the geographic licensee.

7. Thus, no matter how the basic qualifications issue is ultimately determined, issue (g) is moot as to the subsumed incumbent licenses. It would be a useless waste of resources for both the Commission and the private parties to litigate a moot question. Nevertheless, Maritime

has answered inquiries about the subsumed licenses to the extent it has responsive information. But Maritime is not and should not be required to go out of its way to expend extremely limited personnel and monetary resources to determine the answers to moot and irrelevant questions.

8. This is not a matter of simply making inquiries of personnel or examining internal documents. To verify, under oath, the current operational status of each of the stations would require Maritime to visit each of the sites in question. Even if this were an otherwise reasonable requirement, Maritime quite simply lacks the funds to do this. It is one thing to say that Maritime's financial hardship does not excuse it from the obligation to respond to a legitimate discovery request.¹ It is quite another thing, however, to assert that Maritime, a bankrupt company with virtually no excess operating capital and only three employees, must incur substantial additional financial obligations to provide information on questions that are moot.²

C. Interrogatory No. 13

9. The Bureau contends that Maritime's response to this interrogatory is still lacking a "[c]onfirmation for each location of each of Maritime's site-based authorizations (1) whether it is currently operating (i.e., on-the-air, transmitting a signal) and (2) whether it has been in continuous operation (i.e., continuously on-the-air, transmitting a signal) since its construction." Maritime has in fact confirmed this information to the extent it is able. As to all of its currently

¹ The Bureau, without offering any evidence whatsoever, essentially accuses Maritime of lying about its financial condition, characterizing it as "Maritime's *alleged* lack of financial resources." *EB Status Report* at p. 3 n.3 (emphasis added). There is nothing "alleged" about it. Maritime's financial status is an open book in the Mississippi bankruptcy proceeding, subject to oversight by both a federal bankruptcy judge and a U.S. bankruptcy trustee. Such reckless characterizations and cheap shots are entirely irresponsible and improper.

² The Bureau is certainly within its right to ask factual questions to which Maritime can respond based on the information known or readily available to it. But this does not translate into a requirement that Maritime perform a factual investigation, including expending unavailable funds on site visits throughout the country, to help the Bureau attempt to make its case. The Commission placed the burden of proceeding and the burden of proof on the Bureau, but the Bureau is effectively attempting to shift that burden to Maritime.

licensed incumbent stations, Maritime stated that the stations were in continuous operation from the time they were constructed to at least early 2006. Where stations are known to still be in operational status, Maritime has so stated. Where stations are known not to be operational, Maritime has acknowledged that and provided the date and reason for temporary discontinuance of operations. As to the subsumed incumbent stations as well as several of the others, Maritime has candidly admitted that the current operational status of the facilities is not known to it. While the Bureau may have hoped for a different response, “I don’t know” is still a valid, proper, and honest response.

10. The Bureau takes issue with Maritime’s resistance to giving an unequivocal yes or no response to whether the stations are “transmitting a signal.” But Maritime has a legitimate concern in this regard. First, Interrogatory No. 13 did not ask whether the stations were “transmitting a signal,” but whether they were operating. Second, in this particular radio service, there is no requirement that a station be actively serving any minimum number of subscriber stations to be deemed constructed and operational for regulatory purposes.³ Third, even where there are such requirements, with the possible exception of certain digital formats, no radio station continuously transmits a signal even when it is in active service to end users. Fourth, Maritime has clearly stated that none of its stations is providing AMTS services to end users, and

³ Similarly, there is no specified period of time after which temporary discontinuance of operations is deemed permanent. (The Bureau in other discovery requests has implied that a one year timeframe is somehow significant.) While certain other services have such a rule, the Maritime services, including AMTS operations, do not. In fact, there is currently pending a rulemaking to establish such a provision. *Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95, and 101 To Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services*, WT Docket No. 10-112, *Notice of Proposed Rulemaking and Order*, 25 FCC Rcd 6996 (2010). The Commission there acknowledges that, because the consequence of permanent discontinuance is automatic termination of the authorization, “it is imperative that our rules provide a clear and consistent definition of permanent discontinuance of operations; *they do not.*” 25 FCC Rcd at 7017 (emphasis added). Whatever objective criterion may be established in that rulemaking, it may not be retroactively applied to Maritime in this case.

it has otherwise identified those stations where the capacity is leased to third parties pursuant to the Commission's secondary market spectrum leasing policies.

11. In an effort to avoid any misunderstanding regarding its response to Interrogatory No. 13, Maritime clarified that it

considers a station to be operating: (a) if it is fully constructed, operational, and capable of handling two way traffic, regardless of whether it is currently serving end users; and/or (b) if the use of spectrum authorized by the licenses has been leased to a third party within the authorized footprint of the station.

Amended and Further Supplemental Response to Interrogatories (March 16, 2012) at p. 4.

Maritime identified the stations that were operating under that definition, and it also identified the stations that were not so operating (i.e., those in temporary discontinuance), as well as those for which the current status is unknown to Maritime. Thus, Maritime has provided substantial information responsive to the interrogatory, and the insistence of a further, unequivocal yes/no answer to a phraseology that was not even part of the original interrogatory is not justified.⁴

D. Interrogatory Nos. 14 & 15

12. The Bureau argues that Maritime's responses are still lacking confirmation or statement:

"whether operations of the stations listed in Table 3 of the Errata have resumed since the date of their temporary suspension and the date(s) on which any such operations resumed." *EB Status Report*, Exhibit E (middle row, last column of chart); and

"Whether any station under any call sign is currently off the air, and, if so, for how long, and why." *EB Status Report*, Exhibit E (bottom row, last column of chart)

⁴ It puts Maritime in a kind of Catch 22. If Maritime answers "no" on the theory that the stations are not transmitting in the sense of serving end users, the Bureau will insist on an adverse inference on the merits of issue (g). If, on the other hand, Maritime answers "yes" on the theory that periodic station identification constitutes transmitting a signal, the Bureau would likely question Maritime's candor. Instead, Maritime has provided the factual details of each stations operational status to the best of its ability.

These objections make no sense. Revised Table 2 provides, inter alia, a statement of the current status for each station as either operational under the meaning stated in the preceding section (status codes O or L), temporarily discontinued (status code T), or unknown (status codes U or G). For those stations reported in Revised Table 2 as being “temporarily discontinued” status, Table 3 provides the date and reason for such temporary discontinuance. It should go without saying that if the current status is non-operational, then operations have not resumed.

E. Conclusion

13. Maritime respectfully suggests that the Bureau’s jeremiad is in reality a tactical effort to create an erroneous impression of uncooperativeness. Maritime has responded to the discovery requests. The Bureau is simply dissatisfied with honest answers that “Maritime does not know,” or with responses that are not simplistic, unequivocal yes-or-no-only responses where the meaning of a particular word may have significant and potentially dispositive legal and regulatory consequences. The Bureau should be directed to get on with discovery and stop wasting time with procedural quibbles, false allegations, and tactical mischaracterizations.

Respectfully Submitted,



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Dated: March 22, 2012

MARITIME'S INTERROGATORY DEFICIENCIES AS OF 3/20

No.	Text of the Interrogatory	Maritime's Amended Response	What is still missing
13	Identify each site-based authorization for which a station is currently operating and whether that station has been in continuous operation	Confirmed only that certain locations of certain of site-based authorizations are <i>capable</i> of transmitting a signal – and not that such locations are <i>currently</i> transmitting a signal ¹ <i>Refused</i> to verify the operating status of each location of 60 of the 67 site-based authorizations at issue ²	Confirmation for each location of each of Maritime's site-based authorizations (1) whether it is currently operating (<i>i.e.</i> , on-the-air, transmitting a signal) and (2) whether it has been in continuous operation (<i>i.e.</i> , continuously on-the-air, transmitting a signal) since its construction.
14	Identify, by call sign and location, (1) each site-based authorization for which a station's operation was discontinued for more than a year; (2) the dates such operation was discontinued and when, if applicable, it resumed; and (3) the reasons why the operation was discontinued	3/16: Maritime "is not able to provide a discrete, exact timeframe during which particular stations were not operating" 3/16: <i>Refused</i> to "verify the specific operational status of each of its locations to determine where, when, and for how long there may have been ... temporary discontinuance" 3/19: Directs Bureau to look to Table 3 which provides dates on which a station's operations were temporarily suspended and why, but not whether operations were resumed ³	Confirmation of whether operations of the stations listed in Table 3 of the Errata have resumed since the date of their temporary suspension and the date(s) on which any such operations resumed
15	Identify any stations currently off-the-air, and if so, explain why and for how long this has been the case	Directs Bureau to response to Interrogatory No. 14, but nothing in the response to Interrogatory No. 14 identifies which calls signs and locations are currently off-the-air, for how long that has been true, and why Directs Bureau to Revised Table 2, but the chart did not identify which calls signs and locations are currently off-the-air, for how long that has been true, and why	Whether any station under any call sign is currently off the air, and, if so, for how long, and why

¹ See Maritime's Amended and Further Supplemental Response to Interrogatories (Amended Responses) filed with the Bureau's Status Report as Exhibit B at pp. 4-5.

² *Id.* at p. 5. Maritime asserts that because these locations are subsumed within the scope of Maritime's geographic licenses, their status is irrelevant and as a result, "Maritime has not attempted to verify the status of these facilities." *Id.* This directly contradicts what Maritime represented to the Presiding Judge during the January 25, 2012 Prehearing Conference. At the Prehearing Conference, Maritime represented it was **not** going to withhold discovery on this basis. See 1/25/12 Transcript at p. 397, attached hereto. In addition, there is no legal basis – and Maritime offers none – for why the information requested is not relevant. Moreover, pursuant to the Commission's rules, Maritime was required to serve any objections it had – including relevance objections – at the time it filed its original interrogatory responses on February 6, 2012. See 47 C.F.R. § 1.323(b). Maritime failed to do so at that time and as such, has waived its right to assert any such objection now.

³ On March 19, 2012, Maritime filed a pleading entitled "Errata and Additional Information Regarding Amended and Further Supplemental Response to Interrogatories" which includes a table identifying dates of temporary suspension of operations (Errata). A copy of this pleading is filed with the Bureau's Status Report as Exhibit C. Maritime does not identify which interrogatory this table is intended to respond to. Assuming it is intended to supplement Maritime's response to Interrogatory No. 14, it still fails to identify whether any operations resumed at these stations.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2012, I caused copies of the foregoing pleading to be served, by U.S. Postal Service, First Class postage prepaid, on the following:

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